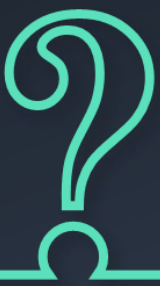
Constitution Day Ceremony

Virtual Program
September 14, 2022

Is the Fourteenth Amendment's **Equal Protection Clause** sufficient to secure the rights of all citizens, or is the **ERA** necessary to protect gender equality?



United States Court of Appeals for the Fourth Circuit

Program

Opening Remarks
The Honorable Roger L. Gregory
Chief Judge

Introduction
Suzanne B. Corriell

Reading of the Third Place Essay
Lochlan Downard
Introduced by Jocelyn Mitchell Manion

Reading of the Second Place Essay
Ada Farmer
Introduced by Sarah Carr

Reading of the First Place Essay
Mira Kisslinger
Introduced by Joseph L. Coleman, Jr.

Presentation of Awards & Closing Remarks
The Honorable Roger L. Gregory

About the Contest

As long as we remain focused on promoting young citizens' understanding of the Constitution, it will remain a powerful instrument for ensuring the stability of our government and the liberty of the governed. The United States Court of Appeals for the Fourth Circuit is pleased to have contributed to this effort through the 2022 Fourth Circuit Essay Contest.

Fifty years ago, on March 22, 1972, Congress sent the Equal Rights Amendment (ERA) to the states for ratification, but only 35 of the 38 required states voted to ratify by the deadline. Students were invited to consider and share their thoughts on the question: "Is the Fourteenth Amendment's Equal Protection Clause sufficient to secure the rights of all citizens, or is the ERA necessary to protect gender equality?"

The contest was open to high school students currently in grades 9 through 12 in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The court received 115 submissions. The top three submissions were selected by our panel of judges through a blind review process.

The court extends its appreciation to its distinguished panel of judges for their work in reviewing the essays and selecting the top three submissions:

- **Wallace K. Lightsey, J.D.**, Attorney, Greenville, SC.
- **Tara Casey, J.D.**, Professor of Law and Director, Carrico Center for Pro Bono & Public Service, University of Richmond School of Law.
- **Alexandra Villarreal O'Rourke, J.D.**, Attorney, Charlotte, NC.
- **Marilyn Ogburn, J.D.**, Attorney, Baltimore, MD.
- **Gabriele Wohl, J.D.**, Attorney, Charleston, WV.

We would like to thank the judges, attorneys, educators, court staff, and students from throughout the Fourth Circuit whose contributions of time and effort helped make our annual high school essay contest a success.

Third Place

Lochlan Downard
Winston-Salem, NC

Lochlan Downard is a rising junior at R.J. Reynolds High School in Winston-Salem, NC, after completing the Paisley IB School Middle Years Program. His favorite subjects are English, History, and Government. Lochlan plans to major and work in Political Science, Law, or English. Lochlan enjoys reading science fiction, writing short stories, politics, and biking.

One aspect of the genius of the Constitution is in its ability to change through amendments; of it, Hamilton said that "time must bring it perfection" (Hamilton). This sentiment that was infused into the United States federal government at its beginning is clearly expressed in the Equal Rights Amendment. That amendment, which prohibits unequal application of the law on the basis of sex, is critical to bringing the Constitution closer to perfection, when every American citizen is ensured "life, liberty, and the pursuit of happiness" as stated in the Declaration of Independence (US 1776). The Fourteenth Amendment is not sufficient to protect the rights of all citizens; it was ratified in 1868, and does not necessarily protect against sex-based discrimination. The ERA is necessary as it codifies an unequivocal stance against such discrimination. In light of the Supreme Court's expected decision to overturn *Roe v. Wade*, too, the ERA is only more essential to maintain judicial precedent without ambiguity.

While the Fourteenth Amendment's Equal Protection Clause is often seen as sufficient, stating that no state can "deny to any person within its jurisdiction the equal protection of the laws," in reality it is too ambiguous to always apply judicially. In the case of

Bradwell v. Illinois, where the first woman to pass the bar exam in the state was denied the ability to practice, an appeal to the Supreme Court on the grounds of the Fourteenth failed ("Myra Bradwell"). Despite its supposed protection of her rights, she was deemed unprotected by dint of being married; the Court ruled against her eight to one. This case was decided in 1873, though, and attitudes have changed towards the role of the woman in American society, rendering this ruling moot. Yet Justice Antonin Scalia, in an interview in 2010, expressed an originalist reading of the Amendment and said, with regards to prohibiting sex discrimination, that "it doesn't" (Condon). And since originalism is so dominant in the present-day Court, the ERA is the only way to ensure that protection against sex discrimination is truly enshrined in the Constitution.

If accepted, the ERA would add the word "women" to the Constitution. That in and of itself is essential in explicitly proving the evolutionary nature of the Constitution, and the populace whose rights it protects. That populace has grown and shifted over more than two centuries, and the founding document of the United States federal government has, as Hamilton and the Founding Fathers intended it to, mirrored those changes. After Emancipation, the Fourteenth Amendment was passed to end the treatment of African-Americans as second-class citizens, and the Fifteenth to enshrine the right of African-American men to vote. The Twenty-First Amendment, ratified half a century after the Fifteenth, extended voting rights to women. Yet the Fourteenth Amendment, as interpreted by Supreme Court, does not protect against sex-based discrimination. That shortcoming is what the ERA solves; if it was added to the Constitution, it would continue the trend toward enfranchisement of American history, and give women the full rights that they, as citizens, deserve.

This need to realize the full rights of America's female citizens is only more pertinent as *Roe v. Wade* seems poised to be struck down by the current Supreme Court. The leaked draft opinion of Justice Samuel Alito directly attacks the right to privacy, a Supreme Court precedent cobbled from the penumbras of amendments in the Bill of Rights, which was first used in *Griswold v. Connecticut* in 1965 and eventually *Roe v. Wade* in 1973, leaving only the Fourteenth

Amendment to uphold *Roe* (Scalia 9). Yet the Fourteenth Amendment is not enough to preserve almost half a century of judicial precedent with regard to *Roe v. Wade*, the only alternative is the ERA. Alito wrote that, when the Court revisited the *Roe* decision with *Planned Parenthood v. Casey* twenty years later, it "grounded the abortion right entirely with the Fourteenth Amendment," and in doing so was "erroneous" (Scalia 51). The link between abortion rights and the ERA is strong; limiting access to abortion promotes gender inequality by putting an "undue burden on women" compared to other procedures of similar risk, and limits societal participation by women forced to carry pregnancies to term, disadvantaging them relative to male counterparts ("ERA and Abortion Talking Points"). An amendment that explicitly forbids such inequality would protect decades of precedent, and introduce to the Constitution a right to abortion unchanged by judicial philosophy.

Though the Equal Protection Clause of the Fourteenth Amendment may seem superficially sufficient to promote gender equality in America, it is not, as judicial history has borne it out to be. From the verdict of *Griswold v. Connecticut* to the repealing of *Roe v. Wade*, the meaning of the Clause has repeatedly been defined as not supporting gender equality or prohibiting sex-based discrimination. A section of an amendment passed in 1868, over half a century before women gained suffrage, does not adequately address the challenges of the United States in the modern day. The ERA, if ratified and entered into the Constitution, would introduce a more modernized version of the Social Contract originally created by the Founding Fathers. As Martin Luther King Jr. once said, "the arc of the moral universe is long, but it bends toward justice" (King). Does it bend toward equality too? If American history, with its predilection towards enfranchisement, is any indication, it does. The ERA is a step in the journey of that long arc, and an undoubtedly needed one.

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Second Place

Ada Farmer
Winston-Salem, NC

Ada Farmer is a rising junior at R.J. Reynolds High School in Winston-Salem, NC. Her favorite subjects are chemistry and math. Ada plans to attend a research university or liberal arts college where she can study biochemistry, environmental science, or international relations while playing D1 or D3 field hockey. Ada's interests include field hockey, dance, guitar, lacrosse, and reading and writing.

For more than 150 years, the Fourteenth Amendment has been the law of the land when it comes to inequality and discrimination disputes. The Equal Protection Clause reads "No state shall… deny to any person within its jurisdiction the equal protection of the laws" (US Const, amend. XIV, sec. 1).

Whether this applies to classifications based on race, sex, gender, age, or disability, that single paragraph has been used in many famous cases brought before the Supreme Court. But, in 1923, Alice Paul proposed the Equal Rights Amendment (ERA), believing that the Equal Protection Clause was not enough to protect the rights of women. The potential amendment reads "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex" (Colohan, 2018). Despite the similar language and wording, the main difference comes in the last four words: "on account of sex". The Equal Rights Amendment is necessary to promote gender equality because its language is undeniable and specific, unlike the Equal Protection Clause. It will force courts to apply a higher level of scrutiny to gender discrimination cases and equalize policies and standards for gender

equality across the country (in states both with and without their own ERA).

Written right after the Civil War, the original purpose of the Fourteenth Amendment was to keep states from discriminating against African American males. Today there has been much debate over how the amendment should be interpreted: using modern-day context or considering its intent when it was written. This argument is extremely politicized today, but it comes down to two sides, the originalists and the living constitutionalists. Originalists are typically more conservative and tend to be Republicans. They are more likely to consider the intent of an amendment when it was written and what it meant in that day and age. Living constitutionalists are usually more liberal and tend to be Democrats. They will often interpret amendments and the Constitution at large in a more modern context and consider the beliefs of the public today. Using the Equal Protection Clause as an example, an originalist judge would likely apply it more strictly to racial discrimination than any other kind of inequality. This is a particularly dangerous possibility today because of the majority of conservatives on the Supreme Court. When the court's opinion on Roe v. Wade was leaked, it showed a loss of support for substantive due process, also based on the Fourteenth Amendment. This idea was based on a living Constitution view of the due process clause. Similarly, this court will be less likely to apply the Equal Protection Clause as extensively to sex and gender discrimination as it does to racial discrimination.

Under the current system, racial classifications and gender classifications are judged by two different tests: strict scrutiny and intermediate scrutiny. Strict scrutiny is applied to any claims of racial discrimination and puts the responsibility on the government to prove that the policy is "the least restrictive means available to achieve a compelling state interest" (Baldez, 248). Sex discrimination is examined under intermediate scrutiny, which requires that the law in question has to be "substantially related to the achievement of an important objective" (Baldez, 248). The most significant effect of the ratification of the ERA would be to apply strict scrutiny to all cases of sex discrimination. This would do a great deal to advance fights for

the rights of both women and LGBTQIA people (Berry, 30) by significantly decreasing the amount of legal classifications based on sex or gender.

Because of intermediate scrutiny, judges have too much discretionary power. The precedent is not clear enough to create a true new system, so judges beneath the Supreme Court can allow their own ideology to determine how they rule. Some judges may choose to apply a standard more similar to strict scrutiny to gender discrimination cases, while others may apply more of a rational basis test (the standard beneath intermediate scrutiny) to the same case (Baldez, 249). This lack of consistency can be seen in states that have an ERA in their own constitution and those that do not have one. Clarifying the standard to be used will equalize policies across the country.

The main argument against the ERA is that it will have no effect at all and is therefore unnecessary. Some believe that all remaining issues of inequality are social issues and that the government has done all that it can. And so we examine the possible consequences of such an amendment. On the positive side, we could reduce gender and sex discrimination across the country through a higher legal standard and clarify policies in all states. When you consider negative consequences, there are few to come up with. If the worst-case scenario is that the amendment is "little more than the constitutional redundancy" that some believe, how can we not move forward with ratification? When the best-case scenario is so positive and the possible negative effects are minimal, this will be a step in the right direction. Even if it doesn't cause all of the change that we hope for, anything is better than nothing.

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First Place

Mira Kisslinger
Bethesda, MD

Mira Kisslinger graduated from Walt Whitman High School in Bethesda, MD. Her favorite subjects are biology, chemistry, government, and calculus. She is now a freshman at Cornell University where she plans to pursue a Human Biology, Health, and Society major before heading to medical school. Mira's interests include photography, women's studies, and politics.

The 14th Amendment to the U.S. Constitution was ratified in 1868 by 28 states. It was one of three Amendments passed during the Reconstruction era to abolish slavery and establish civil and legal rights for African Americans. By granting citizenship to all persons born or naturalized in the United States, including former slaves, and by guaranteeing all citizens "equal protection of the laws," the 14th Amendment was enacted as a direct response to the 1857 *Dred Scott v. Sandford* decision, which found that African Americans were not citizens, and also the various harsh Black Codes inflicted on black people by southern states in the Jim Crow era.

While the Equal Protection Clause has been vitally important in fostering civil rights legislation and legal protections for African Americans over the years, the question often arises whether these 14 words in the 14th Amendment, are the appropriate and adequate legal tool to protect the rights of women and LGBTQ+ citizens? The short and clear answer is no.

While there definitely have been gains for women over the years, due to passing of laws such as Title VII and Title IX of the Civil

Rights Act, inequality, discrimination, and harassment on the basis of sex and gender remain constant and overwhelming. Women today do not receive equal protection under the law, or equal opportunities, or equal justice. While making some slow improvement since the 1970's, women still earn only 82 cents for every $1 that men make.[1] Women, especially women of color, are more than 6% more likely to be poor than men.[2] In terms of sexual violence and harassment, in a 2018 survey, 82 percent of women reported experiencing sexual harassment in the workplace.[3] 90 percent of all rape cases are against women, and one in six women have reported attempted or completed rape.[4] This does not even include the majority of sexual harassment and assault cases that go unreported. In terms of reproductive rights, in the face of the Supreme Court's likely overturn of *Roe v. Wade,* women are facing an avalanche of new laws enacted by the states to restrict, limit, and even eliminate their rights to abortion, contraception, and other reproductive health.[5] Oklahoma just passed a law to outlaw nearly all abortions.[6] There are many other examples of discrimination that women face every day on the basis of their gender and pregnancy status.[7]

So, what would an Equal Rights Amendment accomplish that the 14th Amendment has not, to help level the playing field and eliminate sexual disparity and harassment? Would it be just a meaningless symbolic gesture? The response is clearly to the contrary. The ERA would provide a rock solid footing for meaningful new laws and protections for women and the LGBTQ+ community.

Forty years ago, on March 22, 1972, 35 states ratified an ERA stating clearly that **"**Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[8] Unfortunately, this effort fell short by three states. Such a Constitutional amendment, if enacted today, would immediately and dramatically result in a handful of tangible benefits to women and the LGBTQ+ community. First, discrimination based on sex and gender would likely be subject to a strict scrutiny test, akin to race, which it currently is not.[9] Accordingly, laws that would directly or indirectly discriminate on the basis of sex and gender would now be

less likely to pass such stringent constitutional analysis. Second, the ERA would (or should, under reasonable court interpretation) impact state's powers to limit women's rights to seek abortions and other reproductive health care. Currently, the protections provided in *Roe v. Wade* arise under a perceived, but not written, right to privacy guaranteed by the Fourteenth Amendment. The ERA would make these rights more certain and indelible. Fourth, the ERA, with a little tweaking, would also include clear protections for LGBTQ+ people, who now are largely excluded from constitutional protections.[10] Finally, as for the symbolic power of such an Amendment – this effect should not be underappreciated. Symbols mean something. We are a nation based on symbols of freedom and justice and equality. The ERA, as a symbol, would provide a needed boost for women and those of the LGBTQ+ community seeking to rally support and awareness for their cause of equality and fair treatment.

Accordingly, particularly as a response to the anticipated overturning of *Roe v. Wade,* the ERA should be brought back to life, clarified, modernized, passed by two-thirds of Congress, and sent to the states for ratification by at least 38 state legislatures, so that the citizens representing far more than *fifty percent* of this country may receive the privileges and protections that, as Benjamin Franklin added to the Declaration of Independence, are due, owing, and "self evident."

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[1] *See* SHRM, *Gender Pay Gap Improvement Slowed During the Pandemic* (https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/gender-pay-gap-improvement-slowed-during-the-pandemic.aspx).

[2] *See* CAP, *The basic facts of American Poverty* (Aug. 3, 2020) (https://www.americanprogress.org/article/basic-facts-women-poverty/)

[3] *See* National Public Radio, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment* (https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-newsurvey-finds-eighty-percent-of-women-have-experienced-sexual-harassment).

[4] *See* RAINN, *Victims of Sexual Violence: statistics* (https://www.rainn.org/statistics/victims-sexual-violence).

[5] *See* NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?* (https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/).

[6] *See* New York Times (April 5, 2022), *Oklahoma Lawmakers Approve Near-Total Ban on Abortion* (https://www.nytimes.com/2022/04/05/us/oklahoma-abortion-ban.html).

[7] *See* NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?* (https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/).

[8] *See* History.com, *Equal Rights Amendment Passed by Congress* (https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress).

[9] *See* M. Wadwha, *Bringing Sex Discrimination Under Strict Scrutiny: The Need for an Equal Rights Amendment Columbia Undergraduate Law Review* (Dec. 29 2020) (https://www.culawreview.org/journal/bringing-sex-discrimination-under-strict-scrutiny-the-need-for-an-equal-rights-amendment).

[10] *See* NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?* (https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/) ("The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.")

United States Court of Appeals for the Fourth Circuit

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